

# ASERS

## Journal of Advanced Research in Law and Economics

### Quarterly

Volume VIII

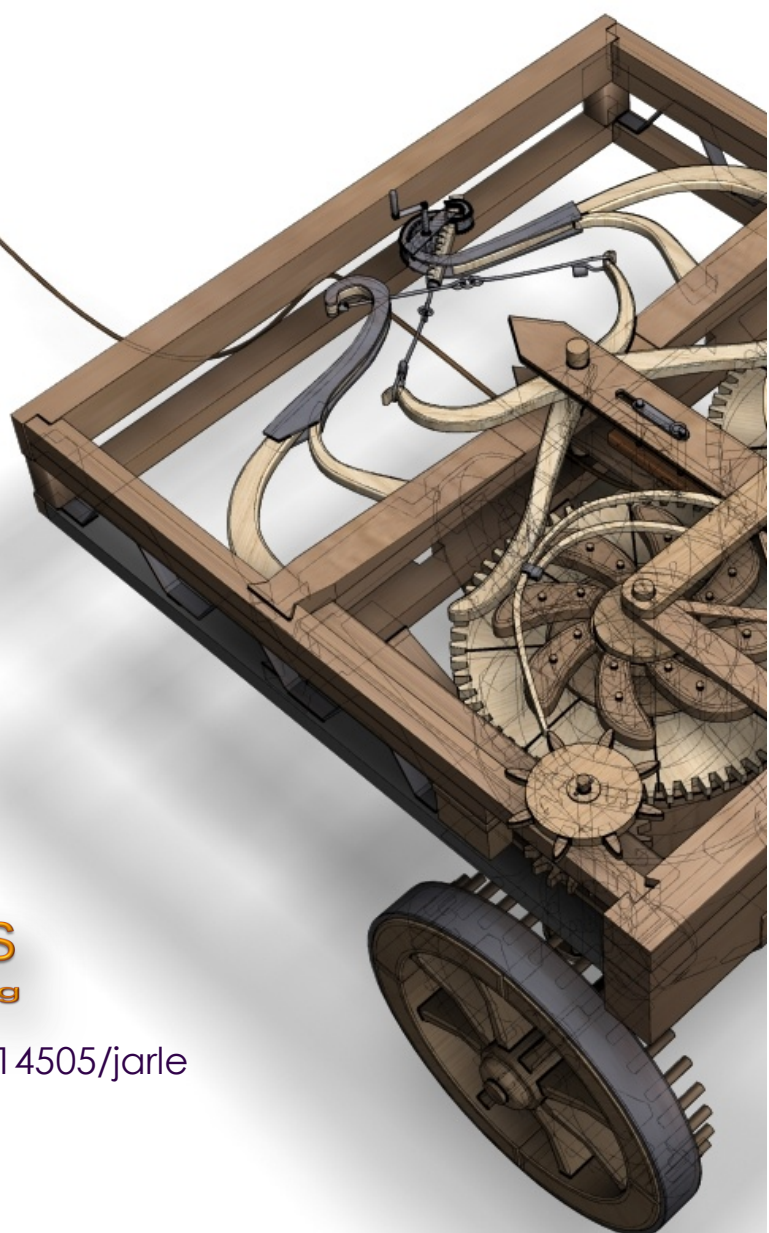
Issue 7(29)

Winter 2017

ISSN: 2068-696X

Journal's DOI: <https://doi.org/10.14505/jarle>

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<http://journals.aserspublishing.eu>  
ISSN 2068-696X  
Journal DOI: <https://doi.org/10.14505/jarle>  
Journal's Issue DOI:  
[https://doi.org/10.14505/jarle.v8.7\(29\).00](https://doi.org/10.14505/jarle.v8.7(29).00)

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## Volume IX, Issue 1(31), Spring 2018

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Expected Publication Date:	March 2017
Web:	<a href="http://journals.aserspublishing.eu">http://journals.aserspublishing.eu</a>
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DOI: [https://doi.org/10.14505/jarle.v8.7\(29\).19](https://doi.org/10.14505/jarle.v8.7(29).19)

## The Investment Concept of Sharia Insurance According to National Sharia Council and Its Regulation in Indonesia

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### Suggested Citation:

Thohir Luth, Burhanuddin, and Budi Santoso. 2017. The Investment Concept of Sharia Insurance According to National Sharia Council and Its Regulation in Indonesia, *Journal of Advanced Research in Law and Economics*, Volume VIII, Winter, 7(29): 2198 – 2205. DOI: [10.14505/jarle.v8.7\(29\).19](https://doi.org/10.14505/jarle.v8.7(29).19). Available from: <http://journals.aserspublishing.eu/jarle/index>

### Article's History:

Received September, 2017; Revised October, 2017; Published December, 2017.

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### Abstract

It is a fact that contemporary Islamic scholars have different opinion related to legalization of insurance (*ta'mîn*). The differences indicate there is a plurality in Islamic legal thought in responding contemporary issues which dynamic along with the change of time. This article is aimed to analysis the investmen concept of sharia insurance explained on dictum (*fatwa*) National Sharia Council (NSC) and its regulations which legitimize those enforcement. This discussion is important 'to introduce the new concept of investing in the insurance products which later has caused controversy from the aspect of validity. The methods used to write this article is critical content analysis by making the NSC's *fatwa* and the regulation of sharia insurance as its object, so both of which can be found the excellence and weakness of the concepts offered. The interesting of this concept is that the investment can be incorporated with insurance products, so that participants who pay a premium not only get guaranty indemnity of risk but also entitled to get a profit sharing of their fund investment. As for the weakness of this concept is the using of hybrid contract which tends to imposed to fullfil pragmatism needs, so that has opened new scientific debate from side of validity.

**Keywords:** investment concept, insurance company, NSC's *Fatwa*.

### JEL Classification:

### Introduction

The term sharia insurance (*ta'mîn*) originates from الأمن meaning inner peace or the loss of fear.<sup>15</sup> Besides that, *ta'mîn* derives from *al-amânah* which is the antonym of treacherous. *Ta'mîn* agreement is a mutual agreement where the insured (*al-muammin*) binds to the insurer (*al-muamman lahu*), who gives insurance guarantee for welfare by financial reimbursement as agreed.<sup>16</sup> According to the dictum (*fatwa*) of NSB, sharia insurance (*ta'mîn*, *takaful*, *tadhamun*) is an attempt of mutual protection and help between a number people/ parties through investment of assets and/or *tabarru'* which provides a pattern of repayment to deal with particular risk through

<sup>15</sup> Al-Ashfahânî, *Al-Mufradât fî Gharîb al-Qur'ân*, (Riyâdh: Maktabah Musthafâ, 2009), 32

<sup>16</sup> Hazîh Hammâd, *Mu'zam al-Mushtalahât al-Mâliyahwa al-Iqtishâdiyah fî Lughat al-Fuqahâ*, (Jedah: Dâr al-Basyîr, 2008M), 124



contact in accordance with sharia.<sup>17</sup> The sharia principle is the principle in insurance activities based on the dictums (*fatwa*) issued by NSC having authority in the field of sharia.

Indonesian Law Number 40 Year 2014 has stated that sharia Insurance (*ta'mîn*) is a collection contract which consists of an agreement between the Islamic insurance company and the policyholder and the agreement between the policyholder in order to manage the contribution based on Islamic principles in order to help and protect each other by means of: (a) Reimburse the participant or policyholder for loss, damage, costs incurred, lost profits, or legal liability to third parties that may be suffered by participants or policyholders because of the occurrence of an uncertain event; or (b) Provide payment based on the participant's death or payment based on the life of participants with a predetermined amount of benefits and/ or based on the results of fund management.<sup>18</sup>

Based on the definition as stated in the dictum, it can be seen that the objective of *ta'mîn* is to protect and help each other among insurance participants. The attempt of mutual protection and help through *ta'mîn* is in accordance with Allah word *t'âwanû 'alâ birri wa al-taqwâ, wa lâ t'âwanû alâ al-itsmi wa al-'udwân* (QS. Al-Maidah[5]: 2). The quoted verse is Allah order to His servants to help each other when practicing goodness and to forbid helping each other in badness and prohibition. According to Ibnu Jarîr, the meaning of *al-itsm* is to leave what has been ordered to leave by Allah, while *al-'udwân* is coming out from Allah provision in religious matters.<sup>19</sup> Thus, to discover whether *ta'mîn* is a form of mutual help in goodness or badness, validity agreements in insurance concept need to be analyzed further.

Today, *ta'mîn* does not formed as an individual relationship, but through a great partnership shares (*syirkâh musâhamah*) for mutual trade among participants to collect large sums of insurance premiums. Collected premiums are a collective right to compensate the unfortunate events occurred among the participants, while the left overs are for investment. If it profits then the results are collected as part of the premium or used for risk compensation.<sup>20</sup> Insurance partnership is run by commercial companies that offer insurance services for a participant who want to get a warranty by sharing of risk from other participants.

Islamic scholars have different opinions regarding the law of insurance (*ta'mîn*). According to 'Abdul Wahâb Khâlaf, the contract in *ta'mîn* allowed is equity participation (*mudhârabah*).<sup>21</sup> Muhammad Al-Bahî stated that *ta'mîn* contract is not a purchase, but a mutual bearing contract (*tadhâman wa takâful*) between participants as whole to ease impacts of various damage. Besides that contract, *mudhârabah* can also be used by participants on one side with the insurance company or the government on the other side.<sup>22</sup> This means that the using more than one contract (*al-'uqûd al-murakkabah*) in insurance product is allowed.

Yusûf Qardhâwî in his book, *Al-Halâl wa al-Harâm fî al-Islâm*, stated that it is not allowed for someone giving charity (*tabarru'*) with something based on the principle to get compensation of treasures when calamity occurs.<sup>23</sup> *Tabarru'* is a gift which when it contains a compensation then it is deemed forbidden (*haram*). If it happened, so it will obscures a legal provisions of *syara'* (rules).<sup>24</sup> By citing a dictum of Ahmad Ibrâhîm, in his book Sayyid Sâbiq stated that the essence problem of *ta'mîn* agreement which is related to life protection so it is illegitimate.<sup>25</sup>

Through above explanation has been found any dissenting opinion among Islamic scholars on validity of insurance. The dissenting indicate that there is a plurality of Islamic legal thought in responding contemporary issues which continues to grow following the change of time. Every islamic scholars has right to interpret the teks of sharia to resolve reality problems based on their comprehension that may be there is differences each other. In the middle of that polarization unfinished, NSC has issued some dictums (*fatwa*) to justify the permissibility of insurance which need to be reviewed scientifically. NSC is part of the Indonesian Ulama Council (IUC) established based on Decree of the Executive Board IUC No. Kep-754/ MUI/ II/1999 on the Establishment of National Sharia Council. NSC is a council formed by the IUC to address issues related to the activity of Islamic financial institutions. Until now, dictum products have been issued by the NSC related to insurance products are:

<sup>17</sup> Fatwa No. 21/DSN-MUI/X/2001 regarding General Guidelines of Sharia Insurance

<sup>18</sup> Articul 1 Point 2, Law of The Republic of Indonesia Number 40 Year 2014 on Insurance (State Gazette of The Republic of Indonesia Number 337 of 2016).

<sup>19</sup> Ibn Katsîr, *Tafsîr al-Qur'ân al-'Âdhîm*, (Riyâd: Dâr al-Thayibah, 1418H), III/ 13

<sup>20</sup> Mushtafâ Ahmad al-Zarqâ, *Nizâm al-Ta'mîn (Haqîqah wa Ra'yu al-Syar'î Fîh)*, (Beirut: Muasasah al-Risalah, 1984), 19

<sup>21</sup> 'Isâ Abduh, *Al-Ta'mîn baina al-Halal wa al-Tahrîm*, (Riyâdh: Dâr al-'îshâm, 1398H), 227

<sup>22</sup> Muhammad Bahî, *Nidhâmal-Ta'mîn fî Huda Ahkâm al-Islâmî wa Dharûrât al-Mujtama' al-Mu'âshir*, (Mujtama' al-Buhûts al-Islâmîyah), 13

<sup>23</sup> Yusûf Qardhâwî, *Al-Halâl wa al-Harâm fî al-Islâm*, (Beirut: Dâr al-Qur'ân al-Karîm, 1987), 256

<sup>24</sup> *Ibid.*

<sup>25</sup> Sayyid Sâbiq, *Fiqh al-Sunnah*, (Beirut: Dâr al-Fikr, 1983), III/ 302

Dictums ( <i>Fatwa</i> ) of NSB	Regarding
Fatwa No. 21/ DSN-MUI/X/ 2001	General guidelines of sharia insurance
Fatwa No. 51/ DSN-MUI/III/2006	<i>Mudharabah musytarakah</i> contract in sharia
Fatwa No. 52/ DSN-MUI/III/2006	<i>Wakalah bil 'ujrah</i> in sharia insurance
Fatwa No. 53/ DSN-MUI/III/2006	<i>Tabarru'</i> contract in sharia insurance and sharia reinsurance

Table 1. Fatwa on Sharia Insurance

To respond those dictums, Indonesian government has issued several regulations to be the legal basis for the enactment of sharia insurance. The enactment of formal juridical regulation is to supplement the weakness of NSC's *fatwa* which is not binding because they are not contained in the systematics legislation in Indonesia. The following explanation is related to critical content analysis of investment concepts which is contained in NSC's *fatwa* and its regulations in Indonesia.

## 2. Critical Analysis

In dictum No. 21/DSN-MUI/X/2001 regarding General Guidelines for Sharia Insurance/ *Ta'mîn*, it is stated that the underlying contract done by the participants and the company consists of *tijârah* and/ or *tabarru'* contract. *Tijârah* contract is all forms of agreement for commercial purposes. While, *tabarru'* contract is all forms of agreement for virtue purposes. *Tijârah* contract in *ta'mîn* use *mudhârabah* for equity sharing and *tabarru'* contract use *hibah* for charity, both of which are implemented simultaneously when the participants pay their premium. Every participant who pays the premium means automatically has invested through *mudhârabah* and done the charity through *hibah*. The participant who pay the premium has a right to claim sharing risk from other participants which must be given by the insurance company as stated in the agreement.<sup>26</sup>

In terms of its type, insurance products consists of the general insurance and life insurance.<sup>27</sup> General Insurance is a business of risk management in order to help and to protect each other of the participants for financial loss or legal liability to third parties due to the occurrence of an uncertain event. While life insurance is a business of risk management in order to help and to protect each other by providing payment based on the life or death of the participants or any other party who is entitled to receive in a certain time of the agreement which amount has been based on the results of fund management.<sup>28</sup>

In *mudhârabah* contract, the company acts as the manager (*mudhârib*) and the participants act as the policyholder (*shâhibul mâl*). If there are profits of management, they will be shared between company and participants based on the percentage ratio agreed. Profit sharing can be done periodically according to the agreed time and the use of amount capital that is growing along with the premium payment. If there is loss in managing the *mudhârabah* fund, in fact there is no exact provision in dictum of NSB.<sup>29</sup> But as we know that if there is loss in the investment contract definitely will be shared in accordance portion of capital. In the original concept of *mudhârabah*, financial capital is only charged to investors while the capital of fund manager is only work competency. But the fact that a basic concept of both parties liability was not reaffirmed on dictums in order to avoid negative perceptions of the participants to insurance company.

Investment contract in insurance product (*al-ta'mîn*) is an interesting concept because it provides guaranty of risks idemnity and to empower the financial of participants. It means that through insurance there is value added of finance that can be expected by the participants who have paid premiums regularly. This motivation can reduce the reluctance of people become participants of insurance product that is considered identical to betting property for guaranting unwanted risks. But this concept has a weakness when it requires updating the data related to the addition amount of capital while premium is paid.

The NSC stated that commercial agreement (*tijârah*) can be changed into non profit agreement (*tabarru'*) if the participant give his financial right to be charity which is managed by insurance company. *Tabarru'* agreement

<sup>26</sup> Fatwa No. 21/DSN-MUI/X/2001 regarding General Guidelines for Sharia Insurance

<sup>27</sup> *Ibid.*

<sup>28</sup> This definition is concluded from Article 1 Point 8 and 9 Law of The Republic of Indonesia Number 40 Year 2014 on Insurance (State Gazette of The Republic of Indonesia Number 337 of 2016).

<sup>29</sup> *Ibid.*



in insurance is all forms of agreement made among participants as the policy holders. In *tabarru'* contract, the participants are the parties entitled to receive charity fund individually (*mu'amman/ mutabarra' lahu*) from insurers collectively (*mu'ammin/ mutabarri*).<sup>30</sup> The participants give charity based on grant contract (*hibah*) which will be used to help the other participants affected by calamity. In this case, the company acts as manager of charity fund representing the whole participants.<sup>31</sup> *Hibah* contract is an agreement which must adhere in all insurance products, because without it the sharing of risks in insurance products would not be implemented.

In managing charity funds (*tabarru' fund*), a contract used by the participants and the insurance company is *wakâlah bil 'ujrah*. In this case, the company acts as the representative (*wakil*), while the participants act as the party who represent (*muwakkil*). *Wakâlah bil 'ujrah* is the delegation of authority from the participants to the insurance company to manage the charity funds begin to collection, cultivation, until its distribution for sharing of risk if one participant unfortunate. By their work, insurance company will get financial compensation (*ujrah*) from participants which its amount is determined by based on the appropriateness principle. If the company results in profits, they have to put in *tabarru'* account belonging to the participants collectively. But, if there is loss without negligence, the company as the representative is not obliged to replace fund by reducing of its compensation because *wakâlah* is a trustful contract (*yad amanah*).<sup>32</sup>

When the insurance company managing the *tabarru'* funds, there are two possibilities, namely a surplus or deficit underwriting. Surplus underwriting take place when the *tabarru'* funds allocated for the replacement of the risks exceed then the reality risks occurred during the period of one year. According dictum, if there is a surplus underwriting of charity (*tabarru'*) funds, there are several alternatives as follows: (1) Treated entirely as a reserve fund in *tabarru'* account; (2) Saved partly as a reserve fund and the rest is distributed to the participants who qualify actuarial/ risk management; and (3) Saved partly as a reserve fund and the rest is distributed distributed to both insurance companies and all participants based on agreement.<sup>33</sup> According author, provision point (1) and (2) are not only legitimate but also possible to be implemented, whereas point (3) is illegitimate because it fund is for social interest, so each parties is prohibited to convert as a profit interests. Furthermore that concept also difficult to be implemented because of many participants who need to be confirmed their approval concerned its distribution.

Defisit underwriting take place when the *tabarru'* funds allocated for the replacement of the risks insufficient to cover the reality risks occurred during the period of one year. If defisit occurred, insurance company is required bails deficiency through lending (*qardh*) temporarily which its repayment will be taken from the reserve of *tabarru'* fund. As a representative of all participants, the insurance company should mandate when managing all the funds entrusted to him. To ensure public trust, the Insurance law has required not only their internal oversight through the commissioner and sharia supervisory board, but also external oversight through The Financial Services Authority's formed by government.

Besides as manager (*mudhârib*) to manage *mudhârabah* funds and as representative (*wakil*) to manage charity funds (*hibah*), the insurance company can also act as the investor by putting his fund for joint investment with the participants collectively. Company fund means a fund derived from shareholders and/ or corporate property which is used to conduct the activities of insurance business, including by investing its own funds. According NSB, the contracts used to legitimize the insurance company role as investor is *mudhârabah musytarakah*, namely combination both contract of equity sharing (*mudhârabah*) and contract of partnership (*musytarakah*). It contract can be applied into product of sharia insurance both related to investment and charity fund.<sup>34</sup> The purpose permissibility of it concept is to optimize benefits for insurance company, beside get from equity sharing and compensation of management services. The following are the basic concept of investment in the sharia insurance and some related contracts.

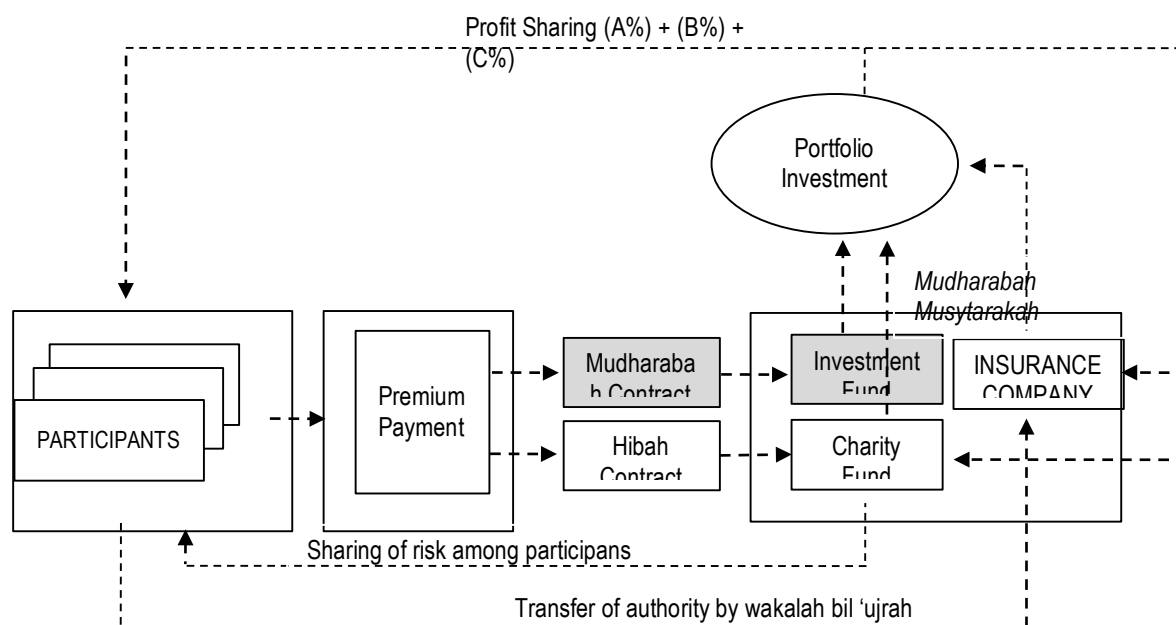
<sup>30</sup> Fatwa No. 53/ DSN-MUI/III/ 2006 regarding *Tabarru'* Contract in Sharia Insurance

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Fatwa No. 51/DSN-MUI/III/2006 regarding *Mudharabah Musytarakah* Contract in Sharia Insurance



**Figure 1.** The Investment Contract in Insurance

The main characteristics of insurance based investments is not only serving indemnity but including distribution of profit sharing in certain periods between insurance company and participants. In same time, insurance companies has some activities in managing investment funds, namely as fund manager for all participants who invest their fund; as fund manager for all participants who own charity fund; and they as an investors who participate in a collective investment with both of participants fund. Multiply roles of course have caused the revenue which is obtained by insurance companies also variety either from profit sharing or compensation of service management. Because there is diversification of business activities so led to this concept is readily accepted for insurance practitioners.

**Table 2.** Activities of Insurance Company

Subject	Insurance Company		
Activities	Fund Manager	Fund Manager	Investor and Fund Manager
Underlying Contracts	Investment Contract (Mudharabah)	Agency Contract (Wakalah bil 'Ujrah)	Partnership Contract (Mudharabah Musytarakah)
Underlying Asset	Investment Fund of Participants	Charity Fund of Participants	Investment Fund of Insurance Company
Revenue	Profit Sharing	Wages	Profit Sharing

Insurance fund is a pool of funds derived from premiums that are established to fulfill the obligations arising from policies issued. The funds which is collected either from participants or the insurance company itself can be invested on a portfolio investment collectively. For investment, insurance company can allocate the fund in a banking or other financial institutions such as to buy a variety of securities in the capital market and/ or securities in money market. According to Regulation of Minister of Finance Number 11/PMK.010/2011, admitted asset in the form of investments shall consist of: *deposits at the bank; sharia stocks; sukuk or sharia bonds; state sharia securities; sharia securities issued by bank indonesia; sharia securities issue by countries other than the Republic of Indonesia; sharia securities issued by multinational institution where the Republic of Indonesia becomes one of its members or shareholders; sharia mutual funds; sharia asset backed securities issued based on collective investment contract of sharia asset backed securities; financing through the mechanism of cooperation with other parties in the form of sharia refinancing; and/ or pure gold.*<sup>35</sup> In general, each of investment portfolio has a maximum limit for equalization fund allocation and to avoid the concentration of investment risk.

<sup>35</sup> Article 5 Point (1) Regulation of Minister of Finance Number 11/PMK.010/2011 concerning Financial Soundness of Insurance Business And Reinsurance Business Using Sharia Principles

As a fund manager, insurance company must choose where investments can be profitable so it can be shared with the participants as investors and as owners of charity fund. If the investment gets profit, so it shall be shared to the owners of the fund in accordance with the portion of capital (A%), (B%) and (C%). Specifically to the portion of profits sharing from the investment of participants  $(A\%) \times (P)$  should be distributed to all individual participant in accordance with the amount of premiums allocated for investment. This distribution requires careful calculation because there is increasing gradually of investment funds from all participants. The following table is a basic concept correlation between the capital portion of each parties with the level of profit sharing in a collective investment on sharia insurance.

**Table 3.** Portion of Profit Sharing

Portion of Capital	Investment Fund of Participants (A%)	Charity Fund of Participants (B%)	Investment Fund of Insurance Company (C%)
Profit Rates (P)	Profit of Portfolio Investment		
Portion of Profit Sharing	$(A\%) \times (P)$	$(B\%) \times (P)$	$(C\%) \times (P)$
Owners Account	Participants Individually	Participants Collectively	Insurance Company

Insurance company which fails to manage the funds can be bankruptcy and it is declared liquidated due to inability to pay the claims submitted by the participants or third parties that have invoices. The participants as policyholders can demand their claim if indemnity of risk and profit sharing right are not fulfilled adequately. This condition occurred when an insurance company fails to manage both the collective of charity funds and investment fund owned by the participants. Then, third parties will charge invoices when at maturity the insurance company is not able to fulfill payment obligations. If there is an invoices from a third parties, the insurance company may not use the funds of participants to pay off that liability, but use funds derived from guarantee fund namely the asset which is the final guarantee in order to protect the interests of policyholders if the insurance company is liquidated.

According to Financial Services Authority of Indonesian, there should be a separation of ownership between the company and the participants related to either asset or liability.<sup>36</sup> The separation of both to apply for *tabarru'* funds, companies fund, and investment funds of participants. This provision is intended to avoid the misuse of funds that could harm certain parties relating to insurance contract. In addition, the separation ownership of asset and liability also aimed to facilitate the distribution of assets when there are advantages and distribution of liability if there are claims from a third party that is demanding payment of debt. That separation is a part accountability principle of good corporate governance which has to be payed attention by all insurance companies to support their soundness of financial aspect.

In managing fund, insurance companies are required to maintain their financial soundness both participants fund and company's own fund. Amongst indicators of financial soundness can be seen from the level of solvency related to the ratio adequacy of funds and liabilities to be paid. For participants fund, there are two level of solvency which must be accomplished both of which *tabarru'* fund and investment fund. According regulation, company must maintain that solvency level of *tabarru'* fund at least thirty percent (30%) of funds needed to anticipate the risk of loss that may arise as a result of the deviation in the management of asset and/ or liability.<sup>37</sup> For investment fund of participants, indicator financial soundness is a maximum limit of fund allocation in each investment portfolio. According regulation, if participant's investment fund is placed on one party shall maintain not to exceed twenty percent (20%) of total participant's investment fund, except for placement of state sharia securities and sharia securities issued by bank Indonesia.<sup>38</sup> Whereas the soundness of company fund tend to be judged through the level of solvency for representing ratio of the asset and the liability of the company.

By analyzing above explanation, it is known that investment concept can be incorporated with sharia insurance through hybrid contracts (*al-'uqūd al-murakkabah*). There are several contracts modified in sharia

<sup>36</sup> Article 2 Regulation of Financial Services Authority Number 72/ POJK.52/ 2016 concerning Financial Health of Insurance Company And Reinsurance Company With Sharia Principles

<sup>37</sup> Article 3 Regulation of Minister of Finance Number 11/PMK.010/2011 concerning Financial Soundness of Insurance Business And Reinsurance Business Using Sharia Principles

<sup>38</sup> Article 33 Point (3)

insurance (*ta'mîn*), such as equity participation (*mudhârabah*), charity contract (*hibah*), agency contract (*wakâlah bil 'ujrah*), combination of equity and partnership contract (*mudhârabah musytarakah*) and debt contract (*qardh*). These contracts are used as underlying transaction, both participants and the insurance company, as well as amongst participants. The consequences of each contract is the emergence rights and obligations of each party that must be been accomplished

Modify the contracts (*al-uqûd*) in insurance is part of the manipulation of Islamic law, because terms of each contract can not be executed perfectly. If the terms of the contracts are not executed, consequently the validity of the agreement will be broken, for example, in Islam law there is no compulsion to give grants (*hibah*), but when *hibah* became part of the insurance contract, participants who do not pay it are penalized, etc. Beside that, the consequences of hybrid contract is that each party both insurance companies and participants have multiple roles at the same time thereby potentially cause ambiguity of transactions.<sup>39</sup> Nevertheless, the NSC considered that this concept is far better than the concept of insurance that accommodating principles clearly forbidden. According their *fatwa*, the principles contradicting with sharia principle like uncertainty (*gharar*), gambling (*maysir*), and usury (*riba*), and etc.

## Conclusions

The concept of investment contained on *fatwa* had formed by NSC through hybrid contracts approach of which each party has a multi role. Participants have role as policyholders, investors and grantors for helping each other who suffered. Of those roles, there are three benefits obtained by participants, namely receive indemnity of risk, profit sharing of investment, and the reward of goodness from helping others. Then from side of insurance company, this concept enable it to get variety benefit as long as insurance services and management of investment fund are managed properly accordance with the regulations enacted, such as the provision of investment fund placement, financial soundness, the separation ownership of assets and liabilities between the company and the participants, allocation of the guarantee fund and other provisions enacting procedurally. The fact that the existence of its regulation is important not only to legitimize but also to complement the weakness of concept offered by NSC's *fatwa*. The materil aspects of weakness is of course its content has caused the new controversy due to alteration terms of the contract in natural into the contract in hybrids to fullfil the needs of pragmatism, while its formal aspects is the characteristics of *fatwa* that is non binding so it does not guarantee legal certainty.

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ISSN 2068-696X

Journal DOI <https://doi.org/10.14505/jarle>

Journal's Issue DOI [https://doi.org/10.14505/jarle.v8.7\(29\).00](https://doi.org/10.14505/jarle.v8.7(29).00)